"to great lengths to try to ensure that every home in America has an equal chance of being included in their sample in order to establish that representativeness."[336] The samples consisting of [redacted] local markets on which Mr. Brooks relies,[337] however, "are not geographically representative of the total U.S." because they exclude "large sections and huge populations of the country."[338] As a result, those samples do not meet Nielsen's standard "that every U.S. household must have a chance to be selected."[339]

E. The Evidence Shows That Mr. Jonathan Orszag's Opinions and Analyses Are Impartial and Reliable

125. Mr. Jonathan Orszag testified on behalf of Comcast as an expert in applied microeconomics specializing in communications issues.[340] Mr. Orszag's testimony was independent and impartial. He has served as an expert in proceedings both for Comcast and adverse to Comcast, and has declined to testify on behalf of Comcast in other cases where his opinions and analyses would be contrary to Comcast's position.[341] No judge or

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[336] Comcast Exh. 349 (Brooks Dep.) 91:1-18; *see also* Comcast Exh. 77 (Egan Written Direct) ¶ 69 ("For example, Nielsen is careful to create a geographically representative national sample. In fact, Nielsen states on its website, 'To be statistically accurate, it is essential that our samples be randomly selected. Every household in the United States has a chance of being selected, no matter where it is located.'") (quoting www.nielsen.com/us/en/about-us/nielsenfamilies).

[337] Tennis Channel Exh. 17 (Brooks Written Direct) ¶¶ 27-28.

[338] Comcast Exh. 77 (Egan Written Direct) ¶ 73.

[339] Comcast Exh. 77 (Egan Written Direct) ¶ 73.

[340] Tennis Channel Exh. 138 (Orszag Dep.) 38:24-39:2; Orszag Direct, Apr. 27, 2011 Tr. 1205:6-17.

[341] Orszag Cross, Apr. 27, 2011 Tr. 1260:20-1262:14; Tennis Channel Exh. 138 (Orszag Dep.) 19:25-22:18.

arbitrator has ever stricken Mr. Orszag's opinions and analyses or rejected them as biased or unreliable.[342]

F. The Evidence Shows That Mr. Michael Egan's Opinions and Analyses Are Impartial and Reliable

126. Mr. Michael Egan testified on behalf of Comcast as an expert in cable television programming.[343] Mr. Egan previously testified as an expert on behalf of Time Warner Cable in the *WealthTV* proceeding, [344] and the Presiding Judge determined that Mr. Egan's testimony was "consistent, convincing, and well organized" and credible.[345]

127. Mr. Egan served as senior vice president of programming and new product development for Cablevision Industries, then the eighth largest cable company in the United States.[346] Mr. Egan also founded and led programming for Renaissance Media Holdings, a cable company that was ultimately sold to Charter.[347] In addition to his work for distributors, Mr. Egan has worked for programmers, including independent networks, in his current position as an industry consultant. Mr. Egan has worked with Celtic Vision in connection with its national launch, GoodlifeTV, and Rainbow Programming, which owns American Movie Classics, IFC, and Sundance.[348]

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[342] Tennis Channel Exh. 138 (Orszag Dep.) 24:7-25:5.

[343] Egan Direct, Apr. 28, 2011 Tr. 1489:1-10.

[344] *See, e.g.*, *WealthTV*, 24 FCC Rcd at 12970 ¶ 5 n.19; Egan Direct, Apr. 28, 2011 Tr. 1488:1-14.

[345] *See, e.g.*, *WealthTV*, 24 FCC Rcd at 12979 ¶ 25 & n.91.

[346] Comcast Exh. 77 (Egan Written Direct) ¶ 4; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1485:15-1486:16.

[347] Comcast Exh. 77 (Egan Written Direct) ¶ 5; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1486:15-1487:3.

[348] Comcast Exh. 77 (Egan Written Direct) ¶ 6; Comcast Exh. 274; Egan Direct, Apr. 28, 2011 Tr. 1487:4-13.

128. To reach his conclusions that Tennis Channel is fundamentally dissimilar to Golf Channel and Versus in terms of programming, Mr. Egan conducted a comprehensive and systematic analysis of the networks' programming, including watching 35 hours of programming and reviewing and analyzing each network's programming schedules.[349] Mr. Egan selected the programming to analyze, created the categories he used to analyze that programming, conducted the programming analysis, and tabulated the results of his analysis.[350]

129. Mr. Egan's familiarity with the programming on Golf Channel, Versus, and Tennis Channel was evident from his detailed testimony. Mr. Egan testified in great detail concerning the programming on each network, describing not only particular programs, but particular episodes of those programs, and discussing specific on-air hosts and personalities on all three networks.[351] Mr. Egan's testimony concerning the programming dissimilarities between Tennis Channel and Golf Channel and Versus is uncontroverted.

G. The Evidence Shows That Mr. Marc Goldstein's Opinions and Analyses Are Impartial and Reliable

130. Mr. Marc Goldstein testified on behalf of Comcast as an expert in sports advertising.[352] Mr. Goldstein had never previously served as an expert witness, and his testimony was independent and impartial.[353]

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[349] Comcast Exh. 77 (Egan Written Direct) ¶¶ 16, 28, 51; Egan Direct, Apr. 28, 2011 Tr. 1497:20-1499:11.

[350] Egan Direct, Apr. 28, 2011 Tr. 1504:5-19.

[351] *See, e.g.*, Egan Direct, Apr. 28, 2011 Tr. 1510:5-1523:4, 1534:17-1548:14.

[352] Comcast Exh. 79 (Goldstein Written Direct) ¶ 1; Goldstein Direct, May 2, 2011 Tr. 2670:9-16.

[353] Tennis Channel Exh. 136 (Goldstein Dep.) 6:20-22.

131. Mr. Goldstein's opinions and analyses were grounded in his more than forty years of experience in television advertising (including 36 years of experience purchasing advertising on television).[354] Until 2010, Mr. Goldstein served as president and chief executive officer of Groupm, an umbrella company for Mindshare, Mediaedge, Mediacom and Maxus, the four independent media companies of the WPP Group, the world's largest advertising, media and research company.[355] For seven years, as founder of General Motors Media Works, Mr. Goldstein was responsible for all of General Motors's national television advertising, including its sports advertising and sponsorship purchases.[356] In addition, Mr. Goldstein served as chairman of the Media Policy Committee of the American Association of Advertising Agencies, the most senior media committee in the organization, and as a member of the board of directors of the Ad Council and the Partnership for a Drug Free America.[357] Mr. Goldstein's testimony is uncontroverted.

XI. Comcast Has Not Unreasonably Restrained Tennis Channel's Ability to Compete Fairly

132. Comcast's decision not to accept Tennis Channel's 2009 proposal has not unreasonably restrained Tennis Channel's ability to compete fairly.[358]

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[354] Comcast Exh. 79 (Goldstein Written Direct) ¶ 2; Goldstein Direct, May 2, 2011 Tr. 2672:11-13.

A. Tennis Channel Is a Successful Network, and Comcast Has Contributed Significantly to Tennis Channel's Success

133. With 26 million subscribers nationwide through 130 distributors,[359] Tennis Channel has grown well beyond the 19 million subscribers deemed by the Commission to be the "minimum viable scale" for a start-up network.[360] In 2005, Mr. Solomon publicly acknowledged that Tennis Channel could succeed with 25 million subscribers,[361] and Tennis Channel's subscriber growth is consistent with its past projections.[362]

134. Tennis Channel has benefited from carriage on Comcast. Comcast was one of the first major distributors to launch Tennis Channel, and it did so without an equity-for-carriage deal and at a time when none of its principal competitors carried Tennis Channel.[363] Tennis Channel has benefited from the "excellent growth" of Comcast's sports tier, from fewer than {[redacted]} subscribers in December 2005 to approximately [redacted] subscribers in December 2010.[364] In addition, Comcast has launched Tennis Channel on tiers more broadly distributed than its sports tier in approximately {[redacted]} Comcast systems, including top tennis markets such as

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[359] Solomon Direct, Apr. 25, 2011 Tr. 247:13-19; Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 8.

[360] *See In the Matter of the Commission's Cable Horizontal and Vertical Ownership Limits, Implementation of Section 11 of The Cable Television Consumer Protection and Competition Act of 1997, Fourth Report & Order*, MM Docket No. 92-264, 23 FCC Rcd 2134, 2162 ¶ 57 (2008) (hereinafter "*Fourth Report & Order*").

[361] Comcast Exh. 342.

[362] Comcast Exhs. 60, 66.

[363] Comcast Exh. 75 (Bond Written Direct) ¶¶ 4-5; Comcast Exhs. 84, 85, 659.

[364] Comcast Exhs. 156, 578; Comcast Exh. 77 (Egan Written Direct) ¶ 103.

Jacksonville, Florida.[365] As a result, at the end of 2010, Comcast distributed Tennis Channel to approximately [redacted] subscribers, [redacted]

B. Tennis Channel's Current Distribution Allows It to Compete for Subscribers Across the United States

135. As Tennis Channel [redacted] the network's distribution by DIRECTV and Dish Network, which have nationwide reach, makes it "Available to Every US Home."[367]

136. A Comcast subscriber who wants to receive Tennis Channel could subscribe to Comcast's sports tier for about $5-8 per month, or could switch to DIRECTV or Dish Network – or, in many markets, to Verizon FiOS, AT&T U-Verse or a cable over-builder.[368]

137. Under these circumstances, Tennis Channel's current distribution allows it to compete for potential subscribers across the entire United States.

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[365] Bond Direct, Apr. 29, 2011 Tr. 1989:15-1990:5; Comcast Exh. 75 (Bond Written Direct) ¶ 7; Comcast Exh. 78 (Gaiski Written Direct) ¶ 21; Comcast Exh. 80 (Orszag Written Direct) ¶ 28; Comcast Exhs. 205, 206.

[366] Comcast Exhs. 201, 206. The number of Tennis Channel subscribers increased from fewer than [redacted] in December 2005 to more than [redacted] at the end of 2010. (Comcast Exh. 206).

[367] Comcast Exh. 435 at TTCCOM_00019691; Solomon Direct Apr. 25, 2011 Tr. 247:13-248:9.

[368] Comcast Exh. 78 (Gaiski Written Direct) at ¶ 4; Orszag Cross, Apr. 27, 2011 Tr. 1370:16-1371:16, 1459:13-1460:1.

C. Tennis Channel's Current Subscriber Count Results from Its Own Deliberate Decisions

138. The evidence shows that it was Tennis Channel, not Comcast, that broke off negotiations over broader carriage.[369] Even after Mr. Solomon learned that other non-affiliated sports tier networks (Sportsman Channel and Outdoor Channel) had exchanged value to incentivize Comcast to give them more distribution, he failed to follow up with Mr. Bond to see whether Tennis Channel might be able to strike a similar deal under which it offered some additional value in exchange for the additional distribution it was seeking.[370]

139. [redacted][371]

140. Tennis Channel's internal documents show, and one of its experts acknowledged, that investment in compelling programming is another way to obtain increased distribution,[372] yet Tennis Channel spends less on its programming than almost any other national sports network.[373] Tennis Channel has the ability to raise additional funds in the capital markets to purchase more valuable programming that might command more interest and demand in the marketplace.[374]

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[369] *See supra* ¶ 32.

[370] *See supra* ¶ 42.

[371] Comcast Exh. 707 at TTCCOM_00018552; Comcast Exh. 709.

[372] Comcast Exh. 349 (Brooks Dep.) 380:23-381:18; Comcast Exh. 89.

[373] *See supra* ¶ 93.

[374] Comcast Exhs. 89, 266; Comcast Exh. 517 (Solomon Dep.) 68:7-70:6.

D. Tennis Channel's Failure to Reach { } Million Subscribers Did Not Result from Comcast's Decision Not to Accept Tennis Channel's 2009 Proposal

141. Tennis Channel has argued in this litigation that it needs distribution to { } to { } million subscribers to improve its success with rightsholders and advertisers.[375] If Comcast had accepted the D1 option in Tennis Channel's 2009 proposal, then Tennis Channel still would have fewer than { } million subscribers.[376]

142. Tennis Channel asserts that being distributed to fewer than [redacted] subscribers affected its acquisition of French Open rights.[377] But if Comcast had accepted the D0 option in Tennis Channel's 2009 proposal, then Tennis Channel would still not reach { } million subscribers.[378] Tennis Channel also argues that it loses programming rights to ESPN2 because ESPN2 has greater distribution.[379] However, if Tennis Channel were distributed to every Comcast subscriber, it would still have half as many as ESPN2's approximately 99 million subscribers.[380]

143. Networks have multiple avenues – including cable companies, satellite operators (e.g., DIRECTV and Dish Network), telcos (e.g., Verizon FiOS and AT&T U-Verse) and Internet streaming – for reaching paying subscribers.[381]

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[375] Tennis Channel Trial Brief at 15-16; Tennis Channel Exh. 15 (Solomon Written Direct) ¶¶ 40-41.

[376] Comcast Exhs. 201, 588, 638.

[377] Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 41.

[378] Comcast Exh. 201.

[379] Tennis Channel Exh. 14 (Solomon Written Direct) ¶ 41.

[380] Comcast Exh. 201; Comcast Exh. 203 at 258.

[381] *See, e.g.*, HRTV web site, www.hrtvlive.com/hrtv (last visited June 6, 2011) (HRTV, formerly HorseRacing TV, is available on a subscription basis over the Internet in addition to being available on Comcast's sports tier).

144. Tennis Channel could reach { [redacted] to { [redacted] } million subscribers without any additional Comcast subscribers.[382] Tennis Channel could obtain { [redacted] million additional subscribers solely from its parent companies, DIRECTV and Dish Network, for a total of { [redacted] } million subscribers.[383]

XII. Tennis Channel's Requested Relief Is Unwarranted

145. The following findings of facts relate to the relief that Tennis Channel seeks in this litigation, as discussed further in the conclusions of law below.

A. The Broad Distribution Requested by Tennis Channel Is Unwarranted

146. Through this litigation, Tennis Channel requests distribution significantly broader than the increased distribution that Tennis Channel proposed to Comcast in 2009.[384] Such broad distribution would increase Comcast's total license payments to Tennis Channel by more than $ { [redacted] } million.[385]

147. Tennis Channel requests greater penetration on Comcast than { { [redacted]

[redacted]

[382] *See* Comcast Exh. 201; Comcast Exh. 368 (Herman Dep.) 367:9-13; Comcast Exh. 363 (Singer Dep.) 336:20-338:2; Comcast Exh. 646 (Simon Dep.) 71:19-24.

[383] Comcast Exh. 201; *see also* Comcast Exhs. 100, 715; Solomon Redirect, Apr. 25, 2011 Tr. 511:3-512:4; Tennis Channel Exh. 15 (Solomon Written Direct) ¶ 8.

[384] Tennis Channel Exh. 18 (Complaint) ¶¶ 101-102; Solomon Cross, Apr. 25, 201 Tr. 322:15-324:21 ("Q: You are suing here for greater distribution than the D1 distribution you proposed in May of 2009, correct? A: As it stands today, yes.").

[385] Comcast Exh. 80 (Orszag Written Direct) ¶ 26.

148. Tennis Channel requests that Comcast be ordered to provide Tennis Channel with more subscribers than [redacted][386]

B. Regardless, the Cost Increase Demanded by Tennis Channel Is Unwarranted

149. Tennis Channel seeks broader distribution at the per-subscriber license fees set forth in the Affiliation Agreement.[387] Comcast agreed to Tennis Channel's fees as part of an integrated agreement that granted Comcast the right to carry Tennis Channel on a sports tier.[388] In negotiating the Affiliation Agreement, Tennis Channel had justified its fees by emphasizing the economics of sports tier carriage, and Comcast agreed because it intended to carry Tennis Channel on a sports tier.[389] Comcast informed Tennis Channel as early as 2005 that the high cost of its license fees, in light of the nature of the network's niche programming, was an impediment to achieving broader distribution.[390]

150. Independent networks such as Sportsman Channel and Outdoor Channel have been able to obtain broader distribution from Comcast by [redacted][391]

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[386] Comcast Exh. 201; Comcast Exh. 80 (Orszag Written Direct) ¶¶ 22-23. DIRECTV carries Tennis Channel [redacted] subscribers while Dish Network distributes the network to [redacted] subscribers. (Comcast Exh. 201).

[387] Tennis Channel Exh. 18 (Complaint) ¶¶ 101-102.

[388] *See supra* ¶¶ 16-18.

[389] *See supra* ¶¶ 16 n.31, 18.

[390] Comcast Exh. 78 (Gaiski Written Direct) ¶ 10; Comcast Exh. 629.

[391] Comcast Exh. 78 (Gaiski Written Direct) ¶ 23.

151. Similarly, Comcast melted the NHL Network from the sports tier to D1 after that network reduced its rate so that the total cost to Comcast for carrying it on D1 was effectively the same as the cost for distributing it on the sports tier.[392]

[392] Comcast Exh. 75 (Bond Written Direct) ¶ 24; Gaiski Cross, May 2, 2011 Tr. 2455:5-21.

PROPOSED CONCLUSIONS OF LAW

Legal Standards

I. Burden of Proof

152. In this *de novo* proceeding,[393] Tennis Channel bears the burden of proceeding with the introduction of evidence and the burden of proving its claim by a preponderance of the evidence.[394]

II. Governing Statutory and Regulatory Provisions

153. Section 616 of the 1992 Cable Act directs the Commission to promulgate regulations that "prevent an [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[395]

154. The Commission's implementing regulations provide that "[n]o [MVPD] shall engage in conduct the effect of which is to unreasonably restrain the ability of an

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[393] *The Tennis Channel, Inc., v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204, 25 FCC Rcd 14149, 14150 ¶ 2 (MB 2010) (hereinafter "*HDO*").

[394] *MASN*, 25 FCC Rcd at 18106 ¶ 12 n.58 ("[E]ven if there were an evidentiary equipoise in this case, [the MVPD] still would prevail absent a preponderance of evidence favoring [the complainant]."); *id.* at 18104 ¶ 10 (finding for the defendant because the complainant "failed to demonstrate" that the defendant engaged in affiliation-based discrimination); *WealthTV*, 24 FCC Rcd at 12995 ¶ 58 (complainant bears "both the burden of proceeding with the introduction of evidence and the burden of proof" (internal quotation marks omitted)). This burden allocation reflects "the usual practice of requiring that the party seeking relief by Commission order . . . bear the burden of proving that the violations occurred." *Id.* (citing, *inter alia*, *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) and 5 U.S.C. § 556(d)).

[395] 47 U.S.C. § 536(a)(3).

unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors."[396]

155. To establish a violation by Comcast of Section 616 and Section 76.1301(c), Tennis Channel must prove each of two elements. First, Tennis Channel must prove that Comcast discriminated against it in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation.[397] Second, it must prove that the effect of the alleged affiliation-based discrimination was to unreasonably restrain Tennis Channel's ability to compete fairly.[398]

III. The Governing Provisions Must Be Construed and Applied Narrowly

A. The Presiding Judge Must "Rely on the Marketplace to the Maximum Extent Feasible"

156. In passing the 1992 Cable Act, Congress recognized that business relationships between networks and distributors are matters of private commercial negotiation, and instructed the Commission to "rely on the marketplace to the maximum extent feasible."[399] In promulgating its program carriage rules, the Commission did not intend to "preclud[e] legitimate business practices common to a competitive marketplace."[400]

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[396] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[397] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 56.

[398] 47 C.F.R. § 76.1301(c); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 56.

[399] 1992 Cable Act § 2(b)(2); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

[400] *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and*

157. Today, the competitive environment is different than it was nearly twenty years ago when the Cable Act was passed because "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992."[401] "Perhaps the most important difference between the industry in 1992 and today [2001] is that in 1992 there was no clear nationwide substitute for cable."[402] The competitive landscape is even more crowded today.[403] Unlike in 1992, cable companies now face fierce competition from at least two and in some cases three other MVPDs – two satellite providers plus perhaps a telco or cable overbuilder – in every geographic market.[404]

Diversity in Video Programming Distribution and Carriage, Second Report & Order, MM Docket No. 92-265, 9 FCC Rcd 2642, 2642 ¶ 1 (1992) (hereinafter "*Second Report & Order*"); *see also WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

[401] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

[402] *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Further Notice of Proposed Rulemaking*, MM Docket No. 98-92, 16 FCC Rcd 17312, 17326-27 ¶ 22 (2001) (hereinafter "*Section 11 FNPRM*").

[403] *Comcast Corp.*, 579 F.3d at 6 ("Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years.").

[404] *See Comcast Corp.*, 579 F.3d at 8 ("A cable operator faces competition primarily from non-cable companies, such as those providing [satellite] service and, increasingly, telephone companies providing fiber optic service."); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, 24 FCC Rcd 4401, 4403 ¶ 4 (2009) (hereinafter "*Status of Competition*") ("Since 2007, there have been a number of changes in the market for the delivery of video programming to consumers, including the expansion of the areas where Verizon and AT&T compete with incumbent cable operators and an increase in the amount of video programming distributed over the Internet."); *see also Comments of NCTA, In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 8, March 28, 2008 ("Since 1992, the development of Direct Broadcast Satellite (DBS) service – which was only just beginning when the ownership provisions were enacted – has fundamentally transformed the distribution marketplace. Today, consumers across the nation have at least three competitive sources of subscription multichannel television services: at least one cable operator, and two established DBS providers.").

158. This fierce competition with other MVPDs "reduces cable operators' incentive to choose programming for reasons other than quality because a cable operator that selects programming on some other basis risks loss of subscribers if high quality programming is available via [satellite]."[405] Competition with other MVPDs also makes it imperative that cable companies control programming expenses.[406]

B. The Commission's Program Carriage Rules Should Not Be Construed to Negate the Legitimate Benefits of Vertical Integration

159. The Commission's program carriage rules should not be interpreted in any manner that would negate the many legitimate benefits of vertical integration, which have been acknowledged by Congress and the Commission. As the legislative history of the Cable Act of 1992 reflects, Congress rejected recommendations to prohibit vertical integration altogether.[407] Instead, Congress recognized "that vertical integration in the cable industry has contributed to enhancing development of innovative programming ventures through efficiencies in financing and by compensating cable systems for assuming the risk associated with launching new programming services."[408] Similarly,

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[405] *Section 11 FNPRM*, 16 FCC Rcd at 17326-27 ¶ 22; *see also MASN*, 25 FCC Rcd at 18113 ¶ 20 (noting that "TWC, under pressure from [satellite] competition, is seeking to free up as much spectrum as possible to add new HD services").

[406] *See Comcast Corp.*, 579 F.3d at 7; *Section 11 FNPRM*, 16 FCC Rcd at 17326-27 ¶ 22 & n.65.

[407] *See* S. Rep. No. 102-92, at 27 (1991) (rejecting a proposal to ban vertical integration because "it would result in a fundamental restructuring of the cable industry and the way it does business").

[408] *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development and Diversity in Video Programming Distribution and Carriage, Notice of Proposed Rulemaking*, 8 FCC Rcd 194, 195 ¶ 5 (1993) (citing H.R. Rep. No. 102-628, at 41 (1992)) (hereinafter "*Sections 12 and 19 NPRM*"); S. Rep. 102-92, at 26-27 (citing benefits of vertical integration, including the way in which vertical integration has "stimulated the development of

the Commission repeatedly has recognized the many benefits of vertical integration, including the potential to "generate significant efficiencies."[409]

C. The First Amendment Requires Narrow Interpretation of the Commission's Program Carriage Rules

160. The First Amendment grants an MVPD "editorial discretion over which [networks] to include in its repertoire,"[410] and requires considerable deference to an MVPD's editorial decisions.[411] The First Amendment's protection applies with equal force to vertically integrated MVPDs.[412] Because the program carriage rules implicate an MVPD's editorial decisions regarding how to distribute content to its subscribers – and

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programming that was necessary to flesh out the promise of cable"); 138 Cong. Rec. S654, S660 (daily ed. Jan. 30, 1992) (statement of Sen. Timothy Wirth) (noting that both the Department of Justice and the Commission agreed that "the many benefits of vertical integration outweigh the costs"); *see also* 47 U.S.C. § 533(f)(2)(D).

[409] *In the Matter of General Motors Corp. and Hughes Electronics Corp., Transferors and the News Corporation Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, at 507-08 (2004); *Fourth Report & Order*, 23 FCC Rcd at 2194 ¶ 142 ("Both Congress and the Commission have recognized that vertical integration can produce efficiencies in the production, distribution, and marketing of video programming, enabling cable operators to make additional investments in distribution plant and programming.").

[410] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *see also City of Los Angeles v. Preferred Commc'ns Inc.*, 476 U.S. 488, 494 (1986).

[411] *See MASN*, 25 FCC Rcd at 18106 ¶ 12 ("TWC contends, among other things, that the Bureau erred in failing to accord sufficient deference to TWC's editorial judgment. We agree.") (citations omitted); *Kucinich v. Cable News Network*, 23 FCC Rcd 482, 482-83 ¶ 2 (MB 2008); *cf. CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) ("The Commission has stated that, in enforcing [Section 312(a)(7) of the Communications Act of 1934], it will provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments." (internal quotation marks omitted)).

[412] *See, e.g.*, *MASN*, 25 FCC Rcd at 18106 ¶ 12; H.R. Rep. 102-628, at 173 ("We note as well that cable operators are vested with certain First Amendment rights with which the Congress should not tamper.").

thus are content-based – they must be narrowly construed.[413] In addition, the Commission has recognized that "any attempt to distinguish between different types" of networks "is likely to raise Constitutional concerns."[414]

161. Congress did not intend to permit the Commission to substitute its own judgments for a cable operator's editorial discretion and overturn a cable operator's good faith business judgments regarding the appropriate distribution of content.[415] The First Amendment protects a cable operator from being compelled to carry a program or network that "reason tells them" should not be carried.[416]

162. In *MASN*, the Commission credited Time Warner Cable's claim that its carriage decision, which was based on a "cost-benefit analysis," was a "reasonable exercise of editorial discretion."[417]

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[413] *See Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996) ("Laws that regulate speech based on its content or that compel speakers to . . . distribute speech bearing a particular message are subject to strict scrutiny." (internal quotations and citations omitted)).

[414] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-29, 22 FCC Rcd 17791, 17840 ¶ 69 (MB 2007).

[415] *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (Where "an administrative interpretation of a statute invokes the outer limit of Congress' power," courts "expect a clear indication that Congress intended that result.").

[416] *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (internal quotation marks omitted).

[417] *MASN*, 25 FCC Rcd at 18106 ¶ 12.

IV. Discrimination Standard

163. The "relevant inquiry" in a program carriage case is whether an MVPD "acted upon" a motive to discriminate on the basis of affiliation or non-affiliation.[418] "The plain language of Section 616(a)(3) permits a finding of program carriage discrimination only in cases where such discrimination is carried out 'on the basis of an unaffiliated programming vendor's affiliation or nonaffiliation.'"[419] "[U]nder this standard, a vertically integrated MVPD may treat unaffiliated programmers differently from affiliates, so long as . . . such treatment did not result from the programmer's status as an unaffiliated entity."[420] In order to prove affiliation-based discrimination, an unaffiliated network must prove that its status as an unaffiliated entity "actually played a role" in the challenged carriage decision and "had a determinative influence on the outcome."[421]

164. There is no affiliation-based discrimination where the challenged carriage decision was based on legitimate business reasons.[422] Where – as here – the legitimate business reasons for a negative carriage decision are memorialized in contemporaneous

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[418] *Id.* at 18115 ¶ 22; *see also WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63.

[419] *MASN*, 25 FCC Rcd at 18106 ¶ 12 (quoting 47 U.S.C. § 536 (a)(3) (brackets omitted).

[420] *Id.* ((brackets and internal quotation marks omitted); *see id.* at 18108 ¶ 13 n.68 ("We find no basis in the record to conclude that TWC's carriage of its affiliated RSNs on basic or expanded basic tiers while refusing such carriage to MASN was motivated by considerations of affiliation rather than by the demand, cost, and bandwidth considerations presented by each network."). In *MASN*, the Commission ruled that the complainant bears the burden of proving its claim by a preponderance of the evidence. *See supra* ¶ 152 & n.394.

[421] *See WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63 (quotation marks and citation omitted).

[422] *MASN*, 25 FCC Rcd at 18099, 18104-06 ¶¶ 1, 10-12; *WealthTV*, 24 FCC Rcd at 12988, 12999 ¶¶ 65, 67.

documentation, that documentation is, according to the Commission, a basis to "truncat[e]" program carriage litigation.[423]

165. Conducting "a cost/benefit analysis and determin[ing] that the benefits of [broader carriage] would not outweigh the substantial costs" is, as a matter of law, a "legitimate and non-discriminatory" basis for deciding against broader carriage.[424] Accordingly, the "high cost of carriage" is a legitimate basis for rejecting a programmer's demand.[425] In assessing whether the potential benefits of broader carriage of an unaffiliated network outweigh the costs, evidence of limited demand for the network is a legitimate and non-discriminatory reason counseling against broader carriage.[426] Evidence of limited demand includes evidence that an MVPD "received no appreciable subscriber complaints" regarding the lack of broader carriage of the unaffiliated network.[427] Other evidence of limited demand includes the absence of customer defection to competitor MVPDs that do carry the programming more broadly, and the lack of advertising by competing MVPDs of the programming discrepancy.[428]

166. The fact that non-vertically integrated cable operators make similar carriage decisions as the vertically integrated MVPD provides "independent evidence" that the vertically integrated MVPD has not engaged in affiliation-based discrimination

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[423] *MASN*, 25 FCC Rcd at 18114 ¶ 21.

[424] *Id.* at 18106, 18112 ¶¶ 12, 19.

[425] *Id.* at 18112 ¶ 19.

[426] *Id.* at 18106-07 ¶ 13.

[427] *Id.* at 18109-10 ¶ 15.

[428] *Id.*

because the non-vertically integrated MVPDs' carriage decisions cannot possibly be based on affiliation.[429]

V. Unreasonable Restraint of the Ability to Compete Fairly

167. A network alleging that its ability to compete fairly is "unreasonably restrain[ed]" must do more than simply show that the challenged carriage decision "adversely affected its competitive position in the marketplace."[430] At a minimum, the network must show that any adverse effect was caused by something other than "a decision . . . on the basis of reasonable and legitimate business reasons that were within the bounds of fair competition."[431]

168. Unlike in 1992, networks now have multiple avenues – including cable companies, satellite operators (e.g., DIRECTV and Dish Network), telcos (e.g., Verizon FiOS and AT&T U-Verse) and Internet streaming – for reaching paying subscribers.[432] Thus, if a network invests in sufficiently compelling content, it need not rely on a single MVPD to meet its distribution goals. Accordingly, the program carriage rules should not be a lever for a network to force a distributor to, in effect, function as an investor or banker by providing the funds that the network needs to buy more valuable programming, which, in turn, may lead to increased distribution.[433]

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[429] *See id.* at 18111-12 ¶ 18.

[430] *WealthTV*, 24 FCC Rcd at 13002 ¶ 73 (alteration in original).

[431] *Id.* at 13003 ¶ 73.

[432] *See supra* ¶ 143.

[433] *Cf.* 1992 Cable Act § 2(b)(2) (Congress instructed the Commission to "rely on the marketplace to the maximum extent feasible."); *WealthTV*, 24 FCC Rcd at 12994 ¶ 55.

Legal Analysis

I. Tennis Channel Has Not Carried Its Burden of Proving That Comcast's Decision Not to Accept Its 2009 Proposal Constituted Affiliation-Based Discrimination

169. The carriage decision that Tennis Channel challenges in this case is Comcast's decision not to accept Tennis Channel's 2009 proposal for broader carriage.[434] The uncontroverted evidence establishes that Tennis Channel's status as an unaffiliated network played no role – much less the required determinative role[435] – in Comcast's decision not to accept Tennis Channel's 2009 proposal for broader carriage.[436] Indeed, it was Mr. Solomon, not Mr. Bond, who cut off negotiations rather than work toward a compromise where the costs and benefits to Comcast were more balanced.[437]

A. Comcast's Decision Not to Accept Tennis Channel's 2009 Proposal Was Based on Legitimate Business Reasons and Not on Affiliation

170. The evidence shows that Comcast's carriage decision in 2009 was based not on discrimination, but on a cost-benefit analysis, the same type of analysis that the Commission ruled in *MASN* is a legitimate and non-discriminatory business rationale.[438] The evidence included credible, uncontroverted testimony from two Comcast executives,

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[434] *See, e.g.*, Tennis Channel Exh. 18 (Complaint) ¶ 52; Tennis Channel Opening, Apr. 25, 2011 Tr. 116:5-12. The foregoing determination is not inconsistent with, and in no way prejudices, Comcast's statute of limitations defense, which is not a matter designated for the Chief Administrative Law Judge to resolve in this proceeding. *HDO*, 25 FCC Rcd at 14149-50 ¶ 2 n.4.

[435] *WealthTV*, 24 FCC Rcd at 12997-98 ¶ 63.

[436] *See supra* ¶¶ 38, 43-46; *cf. WealthTV*, 24 FCC Rcd at 12989-90 ¶ 45 (network's peremptory termination of negotiations was not evidence that Comcast failed to negotiate in good faith).

[437] *See supra* ¶ 32.

[438] *MASN*, 25 FCC Rcd at 18104-06, 18112 ¶¶ 10-12, 19; *WealthTV*, 24 FCC Rcd at 12998, 12999 ¶¶ 65, 67.

corroborated by contemporaneous documentation, that Comcast conducted a cost-benefit analysis and determined that the [redacted] million of additional costs greatly outweighed any anticipated benefits.[439] Tennis Channel's own contemporaneous analysis also showed that accepting the 2009 proposal would have increased Comcast's costs considerably.[440]

171. Tennis Channel offered no analysis of its own as to benefits that would offset these increased costs in order to refute or discredit Comcast's analysis. It is not discrimination for corporations, such as Comcast, in the business of earning profits for shareholders, to decline proposals that appear likely to produce losses.[441] There is no legal requirement under Section 616 that corporations in the business of distributing video programming either incur losses or increase subscriber fees merely to increase distribution of programming to consumers who can already purchase that programming.[442]

B. Comcast's Prior Carriage Decisions Are Evidence That It Has Not Discriminated Against Tennis Channel

172. The evidence shows that Comcast was among the first large MVPDs to carry Tennis Channel, and that Tennis Channel's distribution on Comcast has grown significantly.[443] These facts are not consistent with Tennis Channel's discrimination claim.

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[439] *See supra* ¶¶ 28, 37-38, 40.

[440] *See supra* ¶ 28 n.63.

[441] *See MASN*, 25 FCC Rcd at 18106 ¶ 12; *see also Second Report & Order*, 9 FCC at 2648-49 ¶¶ 15, 17.

[442] *See MASN*, 25 FCC Rcd at 18106 ¶ 12; *see also Second Report & Order*, 9 FCC at 2648-49 ¶¶ 15, 17.

[443] *See supra* ¶ 134.

173. The evidence relating to Comcast's consideration of Tennis Channel's MFN offers in 2006 and 2007 also shows that Comcast did not act based on any motive to discriminate against Tennis Channel because of its non-affiliation.[444] Comcast performed a cost-benefit analysis of each offer, documented its analysis and explained its analysis to Tennis Channel.[445] There is no evidence that Tennis Channel ever disagreed with or disputed those cost-benefit analyses, which evaluated Tennis Channel as if it were an affiliate, partially owned by Comcast, and Mr. Solomon testified that Comcast's decisions to reject these offers were not discriminatory.[446]

174. The evidence establishes that it was Tennis Channel, not Comcast, that ended negotiations in June 2009, when Tennis Channel's CEO declared that he was not interested in "half measures," and that further negotiations would be a "waste of time."[447] As in *WealthTV*, Comcast's willingness to continue negotiations demonstrates that it did not act on any discriminatory motive.[448] The fact that shortly after Tennis Channel ended negotiations, Comcast successfully negotiated broader carriage deals with two other unaffiliated networks is further evidence of non-discrimination.[449]

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[444] *See supra* ¶¶ 24-26. [redacted] *See supra* ¶ 26 n.58.

[445] *See supra* ¶¶ 24-26.

[446] *See supra* ¶ 26.

[447] *See supra* ¶ 32.

[448] *WealthTV*, 24 FCC Rcd at 12990 ¶ 45 ("Even though carriage of WealthTV was a low priority for Comcast, the preponderance of evidence thus shows that Comcast was willing to negotiate in good faith.").

[449] *See supra* ¶ 42.

C. Tennis Channel's Carriage by Other Distributors Provides Independent Evidence That Comcast Has Not Discriminated Against Tennis Channel

175. Comcast's carriage of Tennis Channel is consistent with the carriage of Tennis Channel by other MVPDs, including other cable operators unaffiliated with Golf Channel and Versus, whose carriage decisions provide "independent evidence" that a cable company has not engaged in discrimination on the basis of affiliation.[450] As of May 2009 and continuing through today, all other major cable operators have carried Tennis Channel on a sports tier, and Comcast distributes Tennis Channel to a higher percentage of its subscribers than [redacted] one of which (Cablevision) did not carry Tennis Channel at all until late 2009.[451] Comcast carries Tennis Channel to a higher percentage of its subscribers than [redacted]}[452] Those cable companies provide important context for Comcast's carriage decisions because they face the same competitive pressures (from satellite, telco distributors, and overbuilders), use similar technologies, and face similar bandwidth constraints.[453] No cable company owns equity in Tennis Channel.[454]

176. Tennis Channel was carried on only one of the two major telco providers as of May 2009 – AT&T did not carry Tennis Channel at all until 2010, when it agreed to a {[redacted]}} distribution level.[455] In January 2010, Tennis Channel was negatively repositioned by Verizon to a lower distribution level [redacted]

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[450] *See supra* ¶¶ 67-72; *MASN*, 25 FCC Rcd at 18111 ¶ 18.

[451] *See supra* ¶¶ 67-71.

[452] *See supra* ¶ 69 n.168.

[453] *See supra* ¶ 68.

[454] *See supra* ¶ 68.

[455] *See supra* ¶¶ 33 n.75, 71.

[redacted][456]

Verizon's negative repositioning of Tennis Channel and AT&T's carriage of Tennis Channel to the minimum number of subscribers permitted under its agreement shows the legitimacy of Comcast's decision not to give up its right to carry Tennis Channel on a sports tier.[457]

177. Comcast's satellite competitors, DIRECTV and Dish Network, carry Tennis Channel to the greatest number of subscribers [redacted] and [redacted], respectively).[458] But Tennis Channel offered substantial equity in itself in order to obtain these deals and they are thus not comparable to transactions with distributors, such as Comcast, which are not part owners. The evidence shows that prior to acquiring their equity interests, DIRECTV and Dish Network refused to carry Tennis Channel at all.[459] This further belies the suggestion that Comcast had any intent to discriminate against Tennis Channel – in fact, Comcast was favoring Tennis Channel by carrying it when all of Comcast's principal competitors were refusing to do so. "[E]ven assuming that the carriage decisions made by DBS operators are relevant for assessing [an MVPD's] carriage decisions"[460] in an ordinary case, they are not appropriate benchmarks here, where Tennis Channel offered equity stakes to receive broad carriage on DIRECTV and Dish Network.[461]

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[456] *See supra* ¶ 71.

[457] *See supra* ¶ 71.

[458] *See supra* ¶¶ 134, 148 & n.386.

[459] *See supra* ¶ 70 n.169.

[460] *MASN*, 25 FCC Rcd at 18112 ¶ 18 n.101.

[461] *See supra* ¶ 70. In fact, Mr. Solomon, whose testimony that these were not equity-for-carriage agreements is contradicted by numerous Tennis Channel documents,